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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

MARISA LAINER, individually and on behalf of all others similarly situated. ) Case No. 2:15-cv-09925-BRO-MRW

**Plaintiff**

VS.

UBER TECHNOLOGIES INC.,

**Defendant.**

) **OPPOSITION TO MOTION TO  
COMPEL ARBITRATION, AND IN  
THE ALTERNATIVE, TO DISMISS  
OR STAY THE CASE**

) Hon. Beverly Reid O'Connell

) Date: May 16, 2016

) Time: 1:30 P.M.

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1                   **Memorandum of Points and Authorities**

2                   **I. Introduction**

3                   These Terms of Use ("Terms") govern the access or use by you, an  
 4                   individual, from within the United States and its territories and  
 5                   possessions of applications, websites, content, products, and services  
 6                   (the "Services") made available in the United States and its territories  
 7                   and possessions by Uber Technologies, Inc. and its subsidiaries and  
 8                   affiliates (collectively, "Uber").

9                   Llaguno Decl., Exh. A at p. 3 (emphasis added).

10                  The Services constitute a technology platform that enables users of  
                       Uber's mobile applications or websites provided as part of the Services  
                       (each, an "Application") to arrange and schedule transportation  
                      and/or logistics services with third party providers of such  
                      services, including independent third party transportation  
                      providers and third party logistics providers under agreement  
                      with Uber or certain of Uber's subsidiaries ("Third Party  
                      Providers"). Unless otherwise agreed by Uber in a separate written  
                      agreement with you, the Services are made available solely for your  
                      personal, noncommercial use.

11                  *Id.* (emphasis added).

12                  The strong presumption in favor of arbitration "does not confer a right to  
                       compel arbitration of any dispute at any time." *Volt Info. Sciences, Inc. v. Bd. of*  
                      *Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989). "[A]rbitration is  
                       a matter of contract and a party cannot be required to submit to arbitration any  
                       dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v.*  
                      *Commc'n Workers of Am.*, 475 U.S. 643, 648 (1986).

13                  Defendant Uber Technologies Inc. (hereinafter "Uber" or "Defendant"), in  
                       bringing its Motion to Compel Arbitration, is trying to force Plaintiff Marisa Lainer  
                      (hereinafter "Plaintiff") to arbitrate under the terms of her consumer account, used  
                      to purchase and use Uber's ride services, which has no relation to the unwelcome  
                      and unrequested text messages recruiting her to apply for a job with Uber. Uber

1 attempts to bypass this issue by arguing that what is arbitrable is a question for  
2 arbitration and the court should look far and wide to find that Defendant's illegal  
3 text messages fit within the scope of Plaintiff's consumer account and agreement.  
4 But, this argument ignores the important role the court still plays in preventing  
5 abuse through over broad interpretations of agreements.

6 Uber is attempting to use the Terms of Use and Privacy Policy consumers  
7 agree to when they sign up for services as an Uber *passenger/customer* and the  
8 arbitration clause contained within to force into arbitration claims arising from the  
9 unrelated and unwelcome employment recruitments it sends to unwilling  
10 consumers. But, this proposed overbroad interpretation of its Terms of Use is  
11 wrong. Recruitments to apply for employment are not subject to the arbitration  
12 clause because they are not related to the purchase, use, status, promotions, or any  
13 other number of other appropriate messages Uber may have sent with regards to  
14 consumers' use of its Services that would fall within the arbitration clause.

15 For these reasons, as described in greater detail herein, the Court should deny  
16 Defendant's Motion to Compel Arbitration.

## 17 **II. Facts**

### 18 **A. Plaintiff Received Texts Offering Employment**

19 This action arises from recruitment texts Defendant Uber sent to Plaintiff  
20 Marisa Lainer recruiting her to become a driver for Uber. Declaration of Marisa  
21 Lainer in Support of Opposition at ¶ 4 ("Lainer Decl."). First Amended Complaint,  
22 Dkt. 16, at ¶ 9-14 ("FAC"). Both of these texts from Defendant stated in relevant  
23 part, "Charlie is inviting you to drive with Uber! Sign up now and get up to \$300  
24 when you start driving..." Lainer Decl. ¶ 4. FAC at ¶ 10 & 14. These text messages  
25 carried no readily apparent recruitment component, nor did they relate in any way  
26 shape or form to Plaintiff's use of Uber services as a customer/passenger in an Uber  
27 vehicle. Plaintiff had never engaged with Defendant to be a potential driver or

1 requests information in regards to it or authorized to that nature. Lainer Decl. at ¶  
 2 5. FAC at ¶ 21. Plaintiff has, however, signed up for Uber's services on January 3,  
 3 2015 and has used Uber's application as a consumer to purchase ride services from  
 4 Uber. Lainer Decl. at ¶ 6.

5 Uber rests its argument in its Motion to Compel Arbitration on the premise  
 6 that the Terms of Use and User Privacy Policy that Plaintiff agreed to while  
 7 registering as a User for Uber encompass the two employment recruitment texts sent  
 8 in this action. Motion to Compel Arbitration, Dkt. 17 at p. 67 ("MTCA").

9 **B. Plaintiff Agreed To Uber's Terms Of Use And Privacy Policy As A  
 10 User and Consumer, Not As A Driver**

11 Defendant argues that Plaintiff in her FAC does not allege that the Arbitration  
 12 Agreement is unenforceable due to unconscionability and thus the agreement was  
 13 not oppressive nor was Plaintiff surprised by it. Motion to Compel Arbitration, Dkt.  
 14 17, p. 13-14 ("MTCA"). Plaintiff, however, was very surprised by Defendant's  
 15 attempts in its Motion to apply Plaintiff's agreement with Uber to use Defendant's  
 16 services as a consumer as creating a sword to attack all potential lawsuits concerning  
 17 ANY action done by Uber, including those that do not touch or concern the subject  
 18 of the agreement. Plaintiff does not contest that there exists a valid arbitration  
 19 clause in an agreement between herself and Uber governing her use as a consumer  
 20 of the transportation service, but strongly opposes Uber's assertion that the subject  
 21 of this action falls within even the broad scope of that agreement.

22 In looking at the Arbitration Agreement contained within the Terms of Use  
 23 that Plaintiff purportedly agreed to as a consumer and user of Uber's services, the  
 24 key term of Services becomes relevant.

25 The Arbitration Agreement cited to in the Terms of Use by Uber that  
 26 form the foundation for their motion similarly specify it applies to the  
 27 Service: You agree that any dispute, claim or controversy arising out  
 28 of or relating to these Terms or the breach, termination, enforcement,

1 interpretation or validity thereof or the use of the Services (collectively  
 2 “*Disputes*”) will be settled by binding arbitration between you and  
 3 Uber . . .

4 Llaguno Decl., Exh. A at p.8, § 6 (emphasis added). When determining what  
 5 the scope and definition of Services is, the Terms of Use and Privacy Policy provide  
 6 separate terms and conditions that make clear it is referring to consumers purchasing  
 7 and using transportation services:

8       **1.**     Services as Defined in the Terms of Use

9 These Terms of Use (“*Terms*”) govern the access or use by you, an  
 10 individual, from within the United States and its territories and  
 11 possessions of applications, websites, content, products, and services  
 12 (the “Services”) made available in the United States and its territories  
 13 and possessions by Uber Technologies, Inc. and its subsidiaries and  
 14 affiliates (collectively, “*Uber*”).

15 Llaguno Decl., Exh. A at p. 3 (emphasis added). While this initial definition  
 16 of Services is somewhat vague, Uber’s Terms of Use supplement it with a much  
 17 more specific definition.

18       **2. The Services**

19       The Services constitute a technology platform that enables users of  
 20 Uber’s mobile applications or websites provided as part of the Services  
 21 (each, an “*Application*”) to arrange and schedule transportation  
and/or logistics services with third party providers of such  
services, including independent third party transportation  
providers and third party logistics providers under agreement  
with Uber or certain of Uber’s subsidiaries (“*Third Party*  
 22 *Providers*”). Unless otherwise agreed by Uber in a separate written  
 23 agreement with you, the Services are made available solely for your  
 24 personal, noncommercial use.

25       *Id.* (emphasis added). Thus, Services is defined as the technology platform  
 26 used by Users such as Plaintiff to arrange and schedule transportation. This  
 27 meaning is further cemented by the following provision in the Terms of Use:

28       **Provision of the Services**

29 You acknowledge that portions of the Services may be made available  
 30 under Uber’s various brands or request options associated with

1 transportation or logistics, including, without limitation, "Uber,"  
2 "UberX," "UberXL," "UberBLACK," "UberSUV," and "UberLUX."  
3 You also acknowledge that the Services may be made available under  
4 such brands or request options by or in connection with: (i) certain of  
5 Uber's subsidiaries and affiliates; or (ii) independent Third Party  
6 Providers, including Transportation Network Company drivers,  
7 Transportation Charter Permit holders or holders of similar  
8 transportation permits, authorizations or licenses.

9 *Id.* at p. 4. This section further shows that Uber's Services consists of the  
10 transportation services to coordinate and purchase rides and are contained under  
11 several different brand names based on the type of ride purchased.

12       2. Services as Defined and Used in the Privacy Policy

13       In examining the Privacy Policy, Uber defines Services similarly to the Terms  
14 of Use as:

15       The Privacy Policy covers both our "online" (e.g., web and mobile  
16 services, including any web sites operated by us such as  
17 www.uber.com, m.uber.com, mobile applications, however accessed  
18 and/or used, whether via personal computers, mobile devices or  
19 otherwise) and "offline" (e.g., collection of data through mailings,  
20 telephone, or in person) activities owned, operated, provided, or made  
21 available by the Company. Our "online" and "offline" activities are  
22 collectively referenced as the "Services."

23       Llaguno Decl., Exh. B, p. 11 (emphases added). But in explaining how it may  
24 contact and use Plaintiff's data as part of the Terms of Use, the Terms and  
25 Conditions further explain that Services refers to the purchase and use of  
26 transportation coordination services and their associated issues.

27       "We use your information to closely monitor which features of the  
28 Services are used most, to allow you to view your trip history, store  
your credit card information on a secure page, view any promotions  
we may currently be running, rate trips, and to determine which  
features we need to focus on improving, including usage patterns and  
geographic locations to determine where we should offer or focus  
services, features and/or resources."

29       "We will send you strictly service-related announcements on rare

1           occasions when it is necessary to do so. For instance, if our Services  
 2           are temporarily suspended for maintenance, we might send you an  
 3           email. Generally, you may not opt out of these communications, which  
 4           are not promotional in nature.”

5           “[W]e may use your Personal Information or Use Information that we  
 6           collect about you:

7           i. To provide you with information or services or process transactions  
 8           that you have requested or agreed to receive including to send you  
 9           electronic newsletters, or to provide you with special offers or  
 10          promotion materials . . . on behalf of us or third parties . . .

11          iii. To improve the Services or our services, to customize your  
 12          experience with the Services, or to serve you specific content that is  
 13          most relevant to you. . . .

14          iv. To enable you to participate in a variety of the Services’ features...

15          v. To contact you with regard to your use of the Services[.]

16          Llaguno Decl., Exh. B, p. 15-16 (emphases added). Uber’s Privacy Policy and  
 17          Terms of Use provide for Uber to contact Plaintiff with respect to her purchase and  
 18          use of Uber’s Services, the services consisting of transportation coordination. These  
 19          contacts may include to provide her updates as to the status of the service, to provide  
 20          promotional material, and more categories related to the use of the service.

21          Uber’s Terms of Use and Privacy Policy do not contain provisions providing  
 22          for Uber to contact Plaintiff with regards to becoming a driver with Uber. Indeed,  
 23          Plaintiff asserts that she never agreed to become an Uber driver, or expressed any  
 24          interest in doing so to Uber, nor did she understand the aforementioned Terms and  
 25          Conditions to encompass such activity anyways. Lainer Decl. ¶ 5, 7-10. As alleged  
 26          in the complaint, Uber texted Plaintiff and recruited her to apply for employment  
 27          despite Plaintiff having never engaged with Defendant to be a potential driver nor  
 28          ever requested Defendant send texts for that purpose. FAC ¶ 10, 14, 21.

### 24          **III. The Court Should Deny Defendant’s Motion Compel Arbitration**

#### 25          **A. Legal Standard**

26          Although the Federal Arbitration Act, 9 U.S.C. *et seq.* (“FAA”) states  
 27          “district courts shall direct parties to proceed on issues as to which an arbitration

1 agreement has been signed,” the role of the Court is to first determine “(1) whether  
 2 a valid agreement to arbitrate exists and, if it does, (2) whether the agreement  
 3 encompasses the dispute at issue.” *Kilgore v. KeyBank, Nat. Ass’n*, 718 F.3d 1052,  
 4 1058 (9th Cir. 2013); quoting *Dean Witter Reynolds, Inc. v. Byard*, 470 U.S. 213,  
 5 218 (1985). The “basic objective” of courts in deciding whether a dispute is  
 6 arbitrable is to ensure that “arbitration agreements, like other contracts, are enforced  
 7 according to their terms and according to the intentions of the parties.” *First  
 8 Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (internal quotations  
 9 omitted).

10 The strong presumption in favor of arbitration “does not confer a right to  
 11 compel arbitration of any dispute at any time.” *Volt Info. Sciences, Inc. v. Bd. of  
 12 Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989). The FAA “does  
 13 not require parties to arbitrate when they have not agreed to do so.” *EEOC v. Waffle  
 14 House, Inc.*, 534 U.S. 279, 294 (2002). “[A]rbitration is a matter of contract and a  
 15 party cannot be required to submit to arbitration any dispute which he has not agreed  
 16 so to submit.” *AT&T Technologies, Inc. v. Commc’ns Workers of Am.*, 475 U.S.  
 17 643, 648 (1986). It follows that “the question of arbitrability – whether [an]  
 18 agreement creates a duty for the parties to arbitrate the particular grievance – is  
 19 undeniably an issue for judicial determination.” *Id.* Further, the presumption in  
 20 favor of arbitration “does not apply in resolving doubts respecting whether the  
 21 parties have reached an agreement respecting what they will arbitrate.” *Hendrick  
 22 v. Brown & Root, Inc.*, 50 F. Supp. 2d 527, 533 (E.D. Va. 1999). The Court “must  
 23 place arbitration agreements on an equal footing with other contracts and enforce  
 24 them according to their terms.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333,  
 25 338-39 (2011) (quotations and citations omitted).

26 “In determining whether a particular claim falls within the scope of the  
 27 parties’ arbitration agreement, [the Court must] focus on the factual allegations in  
 28

1 the complaint rather than the legal causes of action asserted.” *P&P Indus., Inc. v.*  
 2 *Sutter Corp.*, 179 F.3d 861, 871 (10th Cir. 1999) (quoting *Genesco, Inc. v. T.*  
 3 *Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987)). The Court here must determine  
 4 the scope issue, not an arbitrator. *See, e.g., Fuqua v. Kenan Advantage Group, Inc.*,  
 5 2012 U.S. Dist. LEXIS 95852, at \*28 (D. Or. Apr. 13, 2012) (“Normally, the court  
 6 decides the scope and validity of an arbitration agreement, including whether it was  
 7 unconscionable.”). *See also Wagner v. Discover Bank*, 2014 U.S. Dist. LEXIS  
 8 3682, at \*13 (D. Colo. Jan. 10, 2014) (the court determined the scope of the  
 9 arbitration clause despite language in the clause that the “scope of this arbitration  
 10 provision” was subject to binding arbitration). Thus, “the first task of a court asked  
 11 to compel arbitration of a dispute is to determine whether the parties agreed to  
 12 arbitrate that dispute.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473  
 13 U.S. 614, 626 (1985). When doing so, the court must assume the truth of the  
 14 allegations in plaintiff’s complaint for the purposes of ruling on defendant’s motion  
 15 to compel arbitration. *Brown v. Dillard’s, Inc.*, 430 F.3d 1004, 1006 (9th Cir. 2005).

16           **B. The Services Agreed To By Plaintiff In the Uber Terms Of Use And**  
 17           **Privacy Policy Do Not Touch The Employment Recruitment Text**  
 18           **Messages At Issue In This Matter**

19           Defendant attempts to take away the Court’s important role as a gatekeeper  
 20 by asserting that incorporation of the AAA Commercial Arbitration Rules into the  
 21 consumer agreement between Uber and Plaintiff forces the Court to let the  
 22 arbitrability of the issue be decided by an arbitrator. *Crooks v. Wyndham Vacation*  
 23 *Ownership, Inc.*, No. 13-CV-03669-WHO, 2013 WL 6039399, at \*6 (N.D. Cal.  
 24 Nov. 8, 2013). This disingenuously misstates the actual test applied which requires  
 25 the Court to first determine “whether the agreement encompasses the dispute at  
 26 issue.” *Kilgore v. KeyBank, Nat. Ass’n*, 718 F.3d 1052, 1058 (9th Cir. 2013).<sup>1</sup>

27

28 <sup>1</sup> For reasons described herein, it plainly does not.

1 While the “relating to” language contained within the arbitration clause in the  
 2 consumer agreement between Uber and Plaintiff causes the Court to apply a  
 3 relatively broad interpretation of the contract, the contract must still “touch matters”  
 4 covered by the contract. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir.  
 5 1999).

6 Examining the arbitration provision contained within the consumer user  
 7 agreement between Plaintiff and Defendant, it is clear that even under broad  
 8 interpretation the agreement does not cover Defendant’s employment recruitment  
 9 communications in this matter as they do not relate to the Services Uber sells to  
 10 Plaintiff.

11           1. The “Related To” Language Cannot Be Construed To Cover  
 12           ALL Communications From Uber

13 Uber asserts that its arbitration agreement contained in the Terms of Use and  
 14 Privacy Policy Plaintiff agreed to when using Uber’s services encompasses the  
 15 employment recruitment texts at issue in this matter, but this position over broadly  
 16 interprets the actual terms agreed to by Plaintiff in signing up.

17 This arbitration agreement specifically states:

18           “You agree that any dispute, claim or controversy arising out of or  
 19 relating to these Terms or the breach, termination, enforcement,  
 20 interpretation or validity thereof or the use of the Services (collectively  
 21 “*Disputes*”) will be settled by binding arbitration between you and  
 22 Uber . . .”

23 Llaguno Decl., Exh. A at p. 8 (emphasis added).

24 The “Services” constitute the technology platform and services used by  
 25 consumers “to arrange and schedule transportation and/or logistics services.”  
 26 Llaguno Decl., Exh. A at p. 3. Uber further reinforces this definition of “Services”  
 27 in describing ways in which it will use Plaintiff’s information to improve Plaintiff’s

use of its services to purchase transportation, such as allowing Plaintiff to “view any promotions we may currently be running, [and] rate trips,” “send[ing] you strictly service-related announcements . . . [such as] if our Services are temporarily suspended for maintenance.” Llaguno Decl., Exh. B, p. 15-16. Uber’s Privacy Policy further provides that it may use Plaintiff’s personal information to “provide you with information or services or process transactions that you have requested or agreed to receive . . . or to provide you with special offers or promotion materials,” “[t]o improve the Services or our services,” “[t]o enable you to participate in a variety of the Services’ features,” and “[t]o contact you with regards to your use of the Services.” *Id.* (emphasis added).

Uber’s definition of “Services” is clearly meant to refer to a consumer’s use of its application and technology for the sake of purchasing transportation services, and Plaintiff agrees that disputes arising from communications from Uber relating to the use of its services would fall within the scope of the arbitration clause. But the communications at issue in this matter, and by extension, the Telephone Consumer Protection Act, 47 U.S.C. 27 *et seq.* (“TCPA”), claims at issue in Plaintiff’s Class Action Complaint, are text messages recruiting Plaintiff to become an employee for Defendant and “[s]ign up now and get up to \$300 when you start driving.” Lainer Decl. at ¶ 4. FAC at ¶ 10 & 14. This communication does not even “touch” Plaintiff’s use of Defendant’s services for purchasing transportation. It fits under none of the Terms of the consumer Terms of Use and Privacy Policy, even when interpreted broadly. It is an unrelated attempt to recruit Plaintiff to apply for employment.

If the Court were to accept Uber’s overly broad interpretation of its arbitration clause to include the employment recruitment at issue in this matter, then consumers in the future could expect all companies to permissibly send them employment offers in the future as they would be encompassed under those companies “services”

and thus be forced into arbitration. An airline could send an offer to a traveler to become a gate attendant when the traveler signs up for flight status updates. An online store could send a consumer who requests tracking information for his purchase an offer to apply to work in its warehouse. In reality, Uber's texts recruiting Plaintiff to apply for employment are completely unrelated to the Services it is permitted to contact Plaintiff about in regards to her consumer account with them.

- a. Uber's Texts Recruiting Plaintiff to Apply for Employment Are Completely Unrelated to the Arbitration Clause in the Consumer Terms of Use

The text messages Uber sent to Plaintiff recruiting her to apply for a position were unrelated to the permissions and terms of the consumer Terms of Use and Privacy Policy Plaintiff entered into when signing up to purchase and use Uber's Services. While Uber petitions the court in its Motion to look beyond the four corners of the documents, it would sooner have to petition the court to look beyond and fall off the four corners of the Earth to make its argument of relation fit.

The Court in ensuring the contract is enforced according to its terms and the intent of the parties may use the “related to” language as a signal to look beyond the four corners of the contract, but the interpretation still must somehow relate to the terms of the contract. *Delgado v. Progress Fin. Co.*, No. 1:14-cv-00033-LJO-MJS, 2014 WL 1756282, at \*5 (E.D. Cal. May 1, 2014). To permit Uber’s interpretation of its Terms of Use as requiring arbitration for any claim a consumer of Uber may bring, even when completely unrelated to the underlying agreement actually entered into, would be akin to the “any and all disputes, controversies or claims” clause the court held inoperative in *Jiffy Lube. In re Jiffy Lube International Inc. Text Spam Litigation*, 847 F.Supp.2d 1253 (S.D. Cal. 2012).

In *Jiffy Lube*, defendant sent a text message to plaintiff recruiting him to join

1 a discount club after plaintiff provided his phone number during an oil change. *Id.*  
 2 The court found that this separate text message recruitment was separate from the  
 3 oil change and arbitration clause contained within and thus not related and not  
 4 subject to arbitration. *Id.* As in *Jiffy Lube*, Plaintiff provided Defendant with her  
 5 phone number as part of purchasing and using Defendant's Services, and Defendant  
 6 then sent Plaintiff. To the extent Uber would attempt to argue that Services should  
 7 be construed broadly to include all communications it sends to anyone who has used  
 8 its services for any reason, it would be an attempt to urge the court to construe the  
 9 arbitration agreement narrowly enough to avoid invalidation, but broadly enough to  
 10 encompass the claims at issue in this case and should be denied as it was in *Jiffy*  
 11 *Lube*. *Id.*

12 Another California federal court has clearly drawn this distinction between  
 13 previous agreements including arbitration clauses and unrelated actions that give  
 14 rise to TCPA claims and are thus not subject to the claims. In *Porter*, the court  
 15 found that while an arbitration agreement existed as to a different prior agreement  
 16 plaintiff had with defendant, defendant's calls violated the TCPA because they were  
 17 wrong calls for another account and thus unrelated to the underlying agreement and  
 18 the arbitration agreement contained therein. *Porter v. Dollar Fin. Grp., Inc.*, No.  
 19 2:14-1638 WBS AC, 2014 WL 4368892, at \*2 (E.D. Cal. Sept. 2, 2014). Similar  
 20 to *Porter*, Uber is attempting to assert that its prior consumer agreement with  
 21 Plaintiff in regards to providing its Services should force all of its communications  
 22 with Plaintiff to fall within the arbitration clause. *Id.* The Court should find this  
 23 similarly unconvincing and find that the recruitment texts are unrelated to the  
 24 arbitration clause.

25 Further, while Uber may argue that there is a "but for" nature underlying  
 26 Plaintiff's claims, this is not enough to establish that the claim arises out of or relates  
 27 to a previous agreement. *Porter v. Dollar Fin. Grp., Inc.*, No. 2:14-1638 WBS AC,  
 28

1 2014 WL 4368892, at \*2 (E.D. Cal. Sept. 2, 2014); *In re Jiffy Lube Int'l, Inc., Text*  
 2 *Spam Litig.*, 847 F. Supp. 2d 1253, 1263 (S.D. Cal. 2012). While “but for” Plaintiff  
 3 having previously provided her phone number to purchase Uber’s Services, it may  
 4 not have had her information to send the unwanted recruitments to, this does not  
 5 cause those messages to arise out of relate to the previous agreement.<sup>2</sup>

6 Thus, the Court should find that the text messages recruiting Plaintiff to apply  
 7 for employment are unrelated to the arbitration clause within the Terms of Use and  
 8 Privacy Policy with regards to Uber’s consumer Services and deny Defendant’s  
 9 motion to compel arbitration.

10 b. The TCPA Debt Collection Cases cited by Defendant are  
 11 completely distinguishable.

12 Defendant presents multiple cases to try and support its position that its  
 13 employment recruitment texts must have fallen within the scope of the rider  
 14 arbitration clause, but these cases are completely distinguishable from the current  
 15 matter and instead show that Plaintiff’s position is favored with regards to the TCPA  
 16 claim not being within the arbitration clause. In *Delgado*, plaintiff sued defendant  
 17 for a TCPA violation relating to defendant’s use of an ATDS to contact him about  
 18 the repayment of a loan he had entered into. *Delgado v. Progress Fin. Co.*, No.  
 19 1:14-cv-00033-LJO-MJS, 2014 WL 1756282, at \*5 (E.D. Cal. May 1, 2014).  
 20 Delgado had specifically signed a disclosure form stating that defendant could  
 21 contact him in regards to the underlying loan he had agreed to, including the  
 22 potential servicing, such that the “relating to” analysis did not even need a broad  
 23 interpretation. *Id.*

24 By contrast in this matter, Defendant’s texts to Plaintiff recruiting her to  
 25 become a driver were not based on an underlying or previously existing agreement.  
 26

27 <sup>2</sup> This assumes that the reason Defendant was sending such recruitment texts to  
 28 Plaintiff was because she provided Uber her phone number as a customer. This is  
 a fact that is yet unknown, and will arise during discovery.

1 Instead, Plaintiff's agreement to Defendant's Terms of Use and Privacy Policy only  
2 specifically encompass her use and purchase of Uber's Services. If Plaintiff had  
3 attempted to bring a TCPA claim in regards to text messages for promotions  
4 regarding the purchase of those Services or status updates, it would be analogous to  
5 *Delgado*. But she has not. Defendant is attempting to shoehorn its unwelcome and  
6 unwarranted employment recruitment into its agreement to provide Services and in  
7 doing so is attempting to fit a square peg into a round hole.

8 Defendant also heavily relies on *Koyoc* in support of its position that because  
9 of the broad "relating to" language, Plaintiff's claim must "touch matters" covered  
10 by the arbitration provision. *Koyoc v. Progress Fin. Co.*, No. CV 13-09165-RSWL  
11 (AGRx), 2014 WL 1878903, at \*4 (C.D. Cal. May 9, 2014). But even the low bar  
12 requiring the provision "touch matters" still requires that the arbitration provision  
13 contain terms relevant to the asserted conduct. In *Koyoc*, which is factually similar  
14 to *Delgado*, plaintiff sued defendant for a TCPA violation arising out of defendant's  
15 attempts to collect on a debt for an underlying agreement on which plaintiff had  
16 become delinquent. *Id.*

17 Thus, once again, the court in applying the "broad" standard did not have to  
18 go far in concluding that attempts to collect on a contract are related to the contract.  
19 And, once again, it is clear that Plaintiff's claim in this matter is completely  
20 distinguishable from this holding as Defendant's employment recruitment text  
21 messages to her were not encompassed within the Services Defendant was  
22 providing to Plaintiff as a consumer of its transportation services. As such, the  
23 Court must find that Uber's agreement to sell Plaintiff transportation services does  
24 not encompass and is not related to the texts from Uber to Plaintiff recruiting her to  
25 apply for a job. Thus, the arbitration clause contained in the Terms of Use and  
26 Privacy Policy does not encompass the dispute at issue and Defendant's motion to  
27 compel arbitration must be denied.

28

#### **IV. Conclusion**

For the reasons set forth herein, Plaintiff humbly requests that the Honorable Court deny Defendant's Motion to Compel Arbitration and Motion to Stay or Dismiss this case.

Finally, if the Honorable Court is inclined to grant Defendant's Motion to compel on the grounds that these issues must be decided by the arbitrator, Plaintiff respectfully requests this matter be stayed pending the results of arbitration, as Plaintiff intends to put the issue before the arbitrator of whether the issue is arbitrable at all, as proposed by Defendant.

Dated: April 18, 2016

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